Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24C(ARB)-11–03 OF 2015
MARY LIM J
10 JUNE 2015

Arbitration — Award — Setting aside — Application to set aside — Whether setting aside part of an award can only be made under s 37(1)(a)(v) — Whether award dealing with matter not contemplated by parties and not falling within terms of submission to arbitration — Principles for exercise of court's discretion to intervene — Whether final award offended principles of natural justice — Whether arbitral tribunal exceeded its jurisdiction — Whether award perverse and required intervention of court — Arbitration Act 2005 ss 37(1)(a)(iv), (v), (2)(b) & (3)

Arbitration — Award — Question of law — Plaintiff seeking courts determination of questions of law arising out of final award — Principles applicable when reviewing awards — Award dealing with matter not contemplated by parties and not falling within terms of submission to arbitration — Breach of rules of fair play and natural justice — Whether intervention justified — Arbitration Act 2005 s 42

Ahmani Sdn Bhd ('Ahmani') was appointed by Petronas Penapisan (Melaka) Sdn Bhd ('Petronas') in a project to extend its warehouse. Petronas issued a termination notice which was challenged by Ahmani and the dispute was referred to arbitration. Petronas counterclaimed for additional costs of RM357,419.80 incurred in completing the balance of the works left uncompleted by Ahmani. The arbitral tribunal ('Tribunal') found that Petronas had acted reasonably and fairly in terminating the contract due to Ahmani's breach. The tribunal found that Petronas had the right to appoint third party contractors to do the remaining 30% of the project. However, in relation to the proof of the sum paid to the third party contractors, there was lack of evidence. In the absence of evidence from the third party contractors to support their documents, the tribunal went on to consider what was a fair amount incurred by the respondent to support its counterclaim. In considering what was a 'fair amount', the tribunal said that it was not disputed the balance 30% of the contract price was RM260,470.20. It went on to say that it was common knowledge that unfinished job would cost more to be completed by another contractor. The tribunal used the factor of 'inflation' in the absence of oral evidence to support the documents for the benefit of the claimant. After considering that an inflation of 20% as reasonable, the arbitral tribunal

calculated the additional costs and awarded Petronas the sum of RM312,564.24 as additional costs incurred to complete the remaining 30% of the works. It was this specific issue of inflation when calculating Petronas' additional costs that Ahmani contended that the tribunal had gone wrong quite aside from its other contention that the tribunal had awarded on an un-pleaded and unclaimed matter. The tribunal was said to have gone wrong by dealing with a matter or issue which Ahmani claimed was not brought up by the parties, that the parties were not alerted to and invited to address, that the Award contained decisions on matters beyond the scope of the submission to arbitration which contravened s 37(1)(a)(v) and 37(1)(b) of the Arbitration Act 2005 ('the Act') and raised questions of law under s 42 of the Act. Under s 42, Ahmani offered four questions of law which it claimed emanated or arose out of the Award; namely: (a) whether the tribunal could award a sum which was not pleaded?; (b) whether the tribunal could award a sum which was not claimed?; (c) whether the tribunal could make its findings based on issue which was never presented or argued before it?; and (d) whether by not inviting parties to present or argue on the issue which formed the basis of its decision, the tribunal had acted beyond its jurisdiction and breached the rules of natural justice?

Held, allowing the application with costs:

(1) Section 37(1)(a)(iv) was not properly invoked as Ahmani was seeking to set aside only a part of the Award that which was in respect of the counterclaim; and not the whole Award as there was that other part of the Award which was in its favour. That being the case, only s 37(1)(a)(v) could be relied on as read together with sub-s (3), it allows for those parts of the Award which contain decisions on matters which had not been submitted to arbitration to be set aside (see para 36).

(2) Section 37(1)(b)(ii) could not be invoked because again, this ground leads to the setting aside of the whole Award and not just the part complained of (see para 37).

(3) In this case, the complaint was that there was a breach of natural justice during the arbitral proceedings or in connection with the making of the Award when the tribunal dealt with the factor of inflation without first inviting the parties to submit or address on the factor. If indeed such an allegation is true, then it would be the whole Award which will be tainted and not just that part identified by the complainant. The provisions of s 37 does not appear to allow the court to sever as it may in cases of allegations of violations of s 37(1)(a)(iv) (see para 39).

(4) That left then a challenge under s 37(1)(a)(v). Here, proof must be offered to show that the Award contained decisions on matters beyond the scope of the submission to arbitration. The tribunal should not base its decision on matters that the parties have not submitted on. Where the

tribunal has done so, as was alleged here, then a case of a breach of natural justice is made out; *Government of India v Cairns Energy & Anor* [2013] MLJ 123 referred (see paras 40 & 43).

(5) The parties did not address the tribunal on the factor of inflation and what would be a fair amount to 'support' Petronas' counterclaim. With a lack of proof, the tribunal ought to have dismissed Petronas' counterclaim. As the counterclaim was essentially a loss and expense claim, there must at the very least be some evidence before the tribunal could come to the decision on the counterclaim. Where there was absent evidence to prove a claim, the claim or counterclaim ought to have been dismissed. Instead, the tribunal proceeded to assess a 'fair amount incurred by the respondent'. It did this by computing and thereby indirectly proving Petronas' counterclaim for Petronas. This is where the tribunal had exceeded its jurisdiction. It was this failure that gave merit to Ahmani's complaint that the award contained a decision on a matter beyond the scope of the submission to arbitration under s 37(1)(a)(v). This rendered the award manifestly unlawful and unconscionable. Accordingly, that part of the award must be set aside (see paras 45–48 & 52).

(6) On the challenge under s 42, questions (a) and (b) did not come within the test of being real, proper and valid questions of law. However, questions (c) and (d) were real and not dressed up questions relating to an appeal against the tribunal's findings (see para 54).

(7) Under s 42, the intervention should only be exercised in clear and exceptional circumstances. The questions of law must only be questions of law and not questions of fact or even questions of mixed fact and law. These questions of law must be identified with sufficient precision or is intelligibly framed citing the grounds or basis relied on. The identified questions of law must also be legitimate, real, proper and valid; and they must arise out of the award and not from or during the proceedings. The tribunal remains the sole determinant of the facts and the evidence. The court however, must intervene where the award is manifestly unlawful and unconscionable (see para 61).

(8) The tribunal did not explain where it sourced the factor of inflation; or the value of that factor of inflation in the matter of the computation of additional costs of completing the remaining works. The tribunal's decision on this matter was clearly one that it could not and should not have embarked on without first hearing out the parties. Doing so not only exceeded the limits of the dispute that was submitted to the tribunal for decision, it also breached the rules of fair play and natural justice. The decision of the tribunal on this matter was within what has been described in *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* as a decision that requires intervention of the court (see para 62).

(9) The tribunal's decision on the counterclaim must be set aside. It was, not for the court to substitute its views to the extent of exercising discretion on the award of nominal damages. It was only appropriate and just that that part of the Award be set aside (see para 64).

Obiter:

The cause papers had not properly intituled the relevant provisions of the Act that were relied on by Ahmani. In view of the numerous grounds of complaint, there should be stricter detailed setting out of the particular grounds of challenge. The responding party must be made well aware of the relevant provisions of the law which are invoked (see para 35).

[Bahasa Malaysia summary

Ahmani Sdn Bhd ('Ahmani') telah dilantik oleh Petronas Penapisan (Melaka) Sdn Bhd ('Petronas') dalam satu projek untuk meluaskan gudangnya. Petronas telah mengeluarkan notis penamatan yang dicabar oleh Ahmani dan pertikaian itu telah dirujuk kepada timbang tara. Petronas telah menuntut balas untuk kos tambahan RM357,419.80 yang ditanggung dalam menyiapkan baki kerja-kerja yang belum disiapkan oleh Ahmani. Tribunal timbang tara ('Tribunal) mendapati bahawa Petronas bertindak wajar dan adil dalam menamatkan kontrak kerana pelanggaran Ahmani ini. Tribunal mendapati bahawa Petronas mempunyai hak untuk melantik kontraktor pihak ketiga untuk melakukan baki 30% projek. Walau bagaimanapun, berhubung dengan bukti daripada jumlah yang dibayar kepada kontraktor pihak ketiga, terdapat kekurangan keterangan. Jika tiada keterangan daripada kontraktor pihak ketiga untuk menyokong dokumen mereka, tribunal seterusnya mempertimbangkan apa jumlah yang adil yang ditanggung oleh responden untuk menyokong tuntutan balas itu. Dalam menimbangkan apa yang merupakan 'jumlah amaun', tribunal mengatakan bahawa ia tidak dipertikaikan baki 30% daripada harga kontrak itu adalah RM260,470.20. Selanjutnya ia mengatakan bahawa itu adalah pengetahuan umum bahawa kerja yang belum selesai akan lebih mahal untuk disiapkan oleh kontraktor lain. Tribunal menggunakan faktor 'inflasi' dalam ketiadaan keterangan lisan untuk menyokong dokumen untuk kepentingan pihak yang menuntut. Selepas mempertimbangkan bahawa inflasi sebanyak 20% sebagai munasabah, tribunal timbang tara dikira kos tambahan dan dianugerahkan Petronas jumlah RM312,564.24 sebagai kos tambahan yang ditanggung untuk menyiapkan baki 30% daripada kerja-kerja. Isu khusus berhubung inflasi ini apabila mengira kos tambahan Petronas yang dihujah oleh Ahmani bahawa tribunal telah tersasar daripada hujahnya yang lain bahawa tribunal telah diawardkan berdasarkan sesuatu perkara yang tidak dipli dan tidak dituntut. Tribunal itu dikatakan telah silap dalam pengendalian perkara atau isu yang Ahmani mendakwa tidak ditimbulkan oleh pihak-pihak, bahawa pihak-pihak tidak dimaklumkan dan dipelawa untuk mengemukakan, yang award itu mengandungi keputusan mengenai perkara yang melampaui skop untuk dikemukakan kepada timbang tara yang melanggar s 37(1)(a)(v) dan 37(1)(b)

Akta Timbangtara 2005 ('Akta') dan menimbulkan persoalan undang-undang di bawah s 42 Akta tersebut. Di bawah s 42, Ahmani menawarkan empat persoalan undang-undang yang mana didakwanya telah wujud atau timbul daripada award itu: iaitu: (a) sama ada tribunal itu boleh mengawardkan suatu jumlah yang tidak dipli?; (b) sama ada tribunal itu boleh mengawardkan suatu jumlah yang tidak dituntut?; (c) sama ada tribunal itu boleh membuat penemuannya berdasarkan isu yang tidak dikemukakan atau dihujah sebelum ini?; dan (d) sama ada dengan tidak mempelawa pihak-pihak untuk mengemukakan atau berhujah tentang isu yang membentuk asas keputusannya, Tribunal itu telah bertindak melampaui bidang kuasanya dan telah melanggar rukun keadilan asasi?

Diputuskan, membenarkan permohonan dengan kos:

(1) Seksyen 37(1)(a)(iv) tidak digunakan dengan betul kerana Ahmani memohon untuk mengetepikan hanya sebahagian daripada Award yang berkenaan tuntutan balas; dan bukan keseluruhan Award itu kerana terdapat sebahagian lain Award itu yang menyebelahinya. Dalam kes sedemikian, hanya s 37(1)(a)(v) boleh digunakan dan dibaca bersama subseksyen (3), ia membenarkan bahagian-bahagian Award tersebut yang mengandungi keputusan-keputusan berhubung perkara-perkara yang tidak dikemukakan kepada timbang tara untuk diketepikan (lihat perenggan 36).

(2) Seksyen 37(1)(b)(ii) tidak boleh digunakan kerana sekali lagi, alasan ini membawa kepada penepian keseluruhan Award itu dan bukan sahaja sebahagian yang diadukan (lihat perenggan 37).

(3) Dalam kes ini, aduan itu adalah terdapat pelanggaran keadilan asasi sepanjang prosiding penimbangtaraan atau berkaitan dengan pembuatan Award itu apabila tribunal mengendalikan faktor inflasi tanpa terlebih dahulu mempelawa pihak-pihak untuk mengemukakan atau mengutarakan faktor tersebut. Jika memang dakwaan itu benar, maka keseluruhan Award itu telah dicemari dan bukan sebahagian sahaja yang dikenal pasti oleh pengadu. Peruntukan s 37 tidak dilihat sebagai membenarkan mahkamah membuat keputusan dengan mudah dalam kes-kes dakwaan pelanggaran s 37(1)(a)(iv) (lihat perenggan 39).

(4) Terdapat cabaran di bawah s 37(1)(a)(v). Di sini, bukti perlu menunjukkan bahawa Award itu mengandungi keputusan-keputusan berhubung perkara-perkara yang melampaui skop yang dikemukakan kepada timbang tara. Tribunal itu tidak patut mengasaskan keputusannya berhubung perkara-perkara yang tidak dikemukakan oleh pihak-pihak itu. Apabila tribunal itu berbuat demikian, sepertimana dikatakan di sini, maka satu kes pelanggaran keadilan asasi telah dibuat; *Government of India v Cairns Energy & Anor* [2013] MLJ 123 dirujuk (lihat perenggan 40 & 43).

(5) Pihak-pihak tidak mengemukakan kepada tribunal tentang faktor inflasi dan apa yang dikatakan jumlah adil untuk '*support*' tuntutan balas Petronas. Tanpa bukti, tribunal itu patut menolak tuntutan balas Petronas. Oleh kerana tuntutan balas itu pada dasarnya tuntutan kerugian dan perbelanjaan, sekurang-kurangnya terdapat keterangan sebelum tribunal itu boleh membuat keputusan berhubung tuntutan balas itu. Di mana tiada keterangan untuk membuktikan tuntutan itu, tuntutan atau tuntutan balas itu patut ditolak. Sebaliknya, tribunal itu terus menaksir '*fair amount incurred by the respondent*'. Ia berbuat begini dengan mengira dan dengan itu secara tidak langsung membuktikan tuntutan balas Petronas untuk Petronas. Ini adalah di mana tribunal itu telah melampaui bidang kuasanya. Kegagalan ini yang memberi merit kepada aduan Ahmani bahawa Award itu mengandungi keputusan berhubung perkara yang melampaui skop yang boleh dikemukakan kepada timbang tara di bawah s 37(1)(a)(v). Ini menyebabkan Award itu menyalahi undang-undang dan tidak berpatutan. Adalah wajar sebahagian Award itu diketepikan (lihat perenggan 45–48 & 52).

(6) Berdasarkan cabaran di bawah s 42, persoalan-persoalan (a) dan (b) tidak jatuh dalam ujian persoalan-persoalan undang-undang yang sebenar, wajar dan sah. Walau bagaimanapun, persoalan-persoalan (c) dan (d) adalah yang sebenar dan bukan persoalan yang direka berkaitan rayuan terhadap tribunal (lihat perenggan 54).

(7) Di bawah s 42, campur tangan itu tidak patut hanya dilakukan dalam keadaan yang jelas dan luar biasa. Persoalan undang-undang mestilah hanya persoalan undang-undang dan bukan persoalan fakta atau persoalan campuran fakta dan undang-undang. Persoalan undang-undang tersebut hendaklah dikenal pasti dengan ketepatan yang mencukupi atau dengan bijak dirangka dengan menyebut alasan atau asas yang dipercayai. Persoalan undang-undang yang dikenal pasti juga perlu sah, sebenar, wajar dan diterima; dan ia mestilah timbul daripada Award itu dan bukan daripada atau semasa prosiding itu. tribunal tetap penentu mutlak fakta dan keterangan. Mahkamah bagaimanapun, perlu campur tangan di mana Award itu adalah menyalahi undang-undang dan tidak berpatutan (lihat perenggan 61).

(8) Tribunal tidak menjelaskan dari mana ia memperoleh faktor inflasi; atau nilai faktor inflasi dalam hal pengiraan kos tambahan menyiapkan kerja-kerja yang masih ada. Keputusan tribunal dalam perkara ini adalah jelas salah bahawa ia boleh tidak dan tidak sepatutnya dimulakan tanpa mendengar terlebih dahulu daripada pihak-pihak. Dengan berbuat demikian bukan sahaja melampaui batas pertikaian yang telah dikemukakan kepada tribunal untuk membuat keputusan, ia juga melanggar rukun yang adil dan keadilan asasi. Keputusan tribunal mengenai perkara ini adalah sepertimana apa yang telah digambarkan

dalam kes *Crystal Realty Sdn Bhd v Insurans Tenaga (Malaysia) Sdn Bhd* sebagai keputusan yang memerlukan campur tangan mahkamah (lihat perenggan 62).

(9) Keputusan tribunal berhubung tuntutan balas itu perlu diketepikan. Ia adalah, bukan bagi mahkamah untuk menggantikan pandangannya budi kepada ganti rugi nominal. Ia hanya sesuai dan hanya itu yang sebahagian daripada Award itu diketepikan (lihat perenggan 64).

Obiter:

Kertas kausa tidak diberi tajuk yang betul untuk peruntukan yang berkaitan dalam Akta yang dijadikan asas oleh Ahmani. Memandangkan banyak alasan aduan, perlu ada penetapan terperinci yang lebih ketat yang menyatakan alasan-alasan tertentu berhubung cabaran. Pihak yang menjawab hendaklah diberi kesedaran peruntukan yang berkaitan dalam undang-undang yang dituntut (lihat perenggan 35).

Notes

For case on question of law, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 1872.
For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1912–1990.

Cases referred to

Awangku Dewa bin Pgn Momin & Ors v Superintendent of Lands & Surveys, Limbang Division [2015] 3 MLJ 161, CA (refd)
Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791, CA (refd)
Government of Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617, CA (refd)
The Government of India v Cairns Energy & Anor [2014] 9 MLJ 149, HC (refd)
SDA Architects (sued as a firm) v Metro Millenium Sdn Bhd [2014] 2 MLJ 627, CA (refd)
Soh Beng Tee & Co Ltd v Fairmount Development Pte Ltd [2007] SGCA 28; [2007] 3 SLR (R) 86, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 37(1)(a)(iv), (1)(a)(v), (1)(b)(ii), (2), 38, 42
Companies Act 1965 s 218

Collin Victor (James Edwin Pusparatnam with him) (James Edwin & Co) for the plaintiff.
Munawirah bt Mohamad (Mashitah bt Abdul Rahman with her) (Abdul Raman Saad & Assoc) for the defendant.

Mary Lim J:

INTRODUCTION

[1] There are four related cases before the court, namely:

(a) 24C(ARB)-11–03 of 2015;

(b) 24C(ARB)-19-04 of 2015;

(c) 24C(ARB)-21-05 of 2015; and

(d) 24C(ARB)-22-05 of 2015.

[2] The first two cases were filed by Ahmani Sdn Bhd ('Ahmani') while the latter two were filed by Petronas Penapisan (Melaka) Sdn Bhd ('Petronas'). These four cases arise out of two arbitrations.

[3] These two arbitrations in turn, arise out of disputes relating to two contracts between the same parties. For practical reasons, the parties agreed to conduct the two arbitrations together since the members of the arbitral tribunal were the same for both arbitrations. However, it was agreed that the arbitral tribunal was to render two separate awards since the two contracts were distinct in nature. The two arbitrations culminated in two separate awards which I shall refer to as award one and award two. Both awards were rendered on the same date, 23 January 2015.

[4] In award one, the arbitral tribunal dismissed Ahmani's claim with costs of the arbitration except for certain vacated fees and refresher where orders had already been ordered on earlier dates. In award two, Ahmani's claim of RM260,019.92 was allowed; but so was Petronas' counterclaim but only to the extent of RM312,564.24. The arbitral tribunal further allowed the counterclaim to be set off against the claim leaving a net effect of Ahmani to pay Petronas the sum of RM52,544.32. Both of Petronas' applications are to seek recognition and enforcement of the two awards.

[5] There was no real challenge of award one and by consent, the order for recognition and enforcement under s 38 of the Arbitration Act 2005 (Act 646) was therefore granted in respect of prayer (a) with no order as to costs in 24C(ARB)-21–05 of 2015.

AWARD TWO

[6] In respect of award two, Ahmani's challenges are under ss 37 and 42 of Act 646 and this account for both of the originating summons filed by Ahmani. Petronas' application is for the recognition and enforcement of award two

under s 38. I shall summarise the challenges and Petronas' responses to those challenges.

[7] But first, the award (henceforth this is to refer only to award two) and what the dispute was all about. Again, I shall only set out what is relevant for the purpose of understanding the present challenges.

[8] By letter of award dated 7 September 2009, Ahmani was appointed by Petronas in a project to extend its warehouse at PP(M)SB. The contract was on a fixed lump sum of RM868,234 and the contract period was from 7 September 2009 until 27 November 2009. The contract sum was to be paid as follows:

(a) 10% upon award and receipt of performance bond and insurance by Petronas;

(b) 40% upon completion of civil and structural works and acceptance by Petronas;

(c) 40% upon completion of mechanical and electrical and instrument works and acceptance by Petronas; and

(d) 10% upon issuance of certificate of provisional acceptance and receipt of warranty bond by Petronas.

[9] The completion date was later extended to 15 July 2010. On 13 September 2010, Petronas issued a termination notice which took effect on 20 September 2010. The termination was challenged and the dispute was referred to arbitration.

[10] Three principal issues arose for determination by the arbitral tribunal:

(a) whether the Petronas had acted reasonably in terminating the contract?

(b) what is the balance of the works not completed by Ahmani under the contract?

(c) whether Ahmani is entitled to claim for the following:

(i) the balance of the contract sum of RM173,646.80

(ii) the value of material on site amounting to RM42,644.

(iii) reimbursement for unpaid preliminaries amounting to RM312,268.

(iv) variation order 1 (change of foundation) amounting to RM74,963.04

(v) electrical items supplied amounting to RM18,892.12

(vi) material and fabricated steel structure taken from Ahmani's sub-contractor's premises amounting to RM24,900

(vii) refund of bank guarantee of RM86,823.40

[11] The arbitral tribunal decided that the contract was rightly and lawfully terminated and it gave its reasons for so deciding in the award. As for the second issue, the arbitral tribunal decided that it was a 'non-issue really because the parties agreed that 70% of the works under the project had been completed'. Because Ahmani had only been paid '50% of the completion of the project but not the remaining 20%', the arbitral tribunal concluded that the 20% should be based on the contract sum and not the tender sum as was done by Ahmani.

[12] Although Ahmani's claim for materials on site was allowed, it was however, not successful in claiming for a reimbursement of unpaid preliminaries. The arbitral tribunal found that Ahmani had failed to prove its claim by producing documentary evidence eg pay slip. Ahmani's claim for variation order also failed because Petronas had never agreed to such work. Items 3(e) and (f) were however allowed.

[13] As for the refund of the bank guarantee, this was rejected by the arbitral tribunal. Since Ahmani had failed to complete the project, Petronas was entitled to liquidate the performance bond (in the form of the bank guarantee). That meant that Ahmani was not entitled to a refund. The total amount awarded was RM260,019.92.

[14] The final matter that the arbitral tribunal dealt with was Petronas' counterclaim. Petronas' counterclaim was for additional costs of RM357,419.80 incurred in completing the balance of the works left uncompleted by Ahmani. That sum of RM357,419.80 was however resolved by Petronas in the following manner:

a. additional costs incurred to complete the remaining 30% of the works	– RM357,419.80
b. liquidated and ascertained damages	– RM86,823.40
Less	
i. performance bond cashed	– RM86,823.40
ii. 20% of the works accepted to have been completed and yet to be paid	– RM173,646.80
Balance counterclaimed	RM183.773.00

[15] So, although Petronas' counterclaim was for RM357,419.80, it had already 'helped itself' to some part of that claim by making some deductions– see above and para 74 of the statement of reply and counterclaim (Warehouse Extension Project) found at exh 'BBA-1' p 71 of Ahmani's affidavit filed in support of the originating summons (encl 2).

[16] And, this is where Ahmani's complaints are seated. In the award, the arbitral tribunal said that because it had found that Petronas had acted reasonably and fairly in terminating the contract due to Ahmani's breach, '*it follows therefore that the respondent is entitled to recover any loss and damages arising therefrom (Article 36.2 of the General Terms and Conditions of Contract)*'. The onus was however, on Petronas to show the loss and damages that it supposedly suffered.

[17] The arbitral tribunal added that; '*Obviously the respondent had the right to appoint third party contractors to do the remaining 30% of the project. We do not think that the claimant can challenge on this*'. What the arbitral tribunal found Ahmani had challenged instead was the 'methodology of the appointment of third party contractors and the evidence in support of the sum paid to them by the respondent'.

[18] Upon evaluation of evidence, the arbitral tribunal concluded that the appointment of the third party contractors was '*carried out in a fair manner*'. It went on to '*observe that the respondent did not appoint directly the third party contractors but asked for quotation from its list of contractors. The purpose of the negotiation, in our view, is surely to see that the quotation would be a fair one and obviously only then would a work order be issued*'.

[19] Moving on to the matter of proof of the sum paid to the third party contractors, the arbitral tribunal was '*inclined to accept the contention of the claimant, the maker of the documents relied on should be called by the respondent in support thereof. Then the claimant can then question the witnesses as to the work carried out including the pricing of the materials etc used on the remaining 30% of the project. The only exception perhaps is where the contents of the documents are agreed by the parties which is not the case here*'.

[20] Because of this lack or 'absence' of evidence, this is what the arbitral tribunal said:

> In the absence of evidence from the third party contractors to support their documents, we then have to consider what is a fair amount incurred by the respondent to support its counterclaim.

[21] In considering what was a 'fair amount', the arbitral tribunal said that '*it is not disputed the balance 30% of the contract price is RM260,470.20*'. But, it did not stop there. It went on to say:

> 'It is common knowledge that unfinished job would cost more to be completed by another contractor. We would use the factor of 'inflation' in this case in the absence of oral evidence to support the documents for the benefit of the Claimant as obviously it has to foot the costs'.

[22] After considering that '*an inflation of 20% as reasonable*', the arbitral tribunal calculated the additional costs as follow:

The balance of 30% of the contract price RM260,470.20

Add 20% inflation RM 52,094.04

RM312,564.24

[23] The arbitral tribunal awarded Petronas the sum of RM312,564.24 as 'additional costs incurred to complete the remaining 30% of the works'. As one may recall, Petronas' claim was for a sum of RM357,419.80. However, after deducting for LAD and monies that it still had to pay Ahmani, Petronas' net counterclaim was a sum of RM183,773. Although the arbitral tribunal's decision on LAD is not questioned, it is worthwhile noting that the arbitral tribunal agreed with Petronas that it could set off the LAD as 'reasonable amount to compensate the respondent for the losses' due to Ahmani's delay. In fact, Petronas had cashed the performance bond to set off the LAD calculated at the total sum of RM86,823.40.

[24] It is the specific issue of inflation when calculating Petronas' additional costs that Ahmani contended that the arbitral tribunal had gone wrong quite aside from its other contention that the arbitral tribunal had awarded on an unpleaded and unclaimed matter. The arbitral tribunal is said to have gone wrong by dealing with a matter or issue which Ahmani claimed was not brought up by the parties, that the parties were not alerted to and invited to address, that the award contains decisions on matters beyond the scope of the submission to arbitration which contravenes sub-paras 37(1)(a)(v) and 37(1)(b) and raises questions of law under s 42.

[25] Under s 42, Ahmani offered four questions of law which it claims emanate or arise out of the award; namely:

(a) whether the honourable panel of arbitrators can award a sum which was not pleaded?

(b) whether the honourable panel of arbitrators can award a sum which was not claimed?

(c) whether the honourable panel of arbitrators can make its findings based on issue which was never presented or argued before it?

(d) whether by not inviting parties to present or argue on the issue which formed the basis of its decision, the honourable panel of arbitrators had acted beyond its jurisdiction and breached the rules of natural justice?

[26] Learned counsel for Ahmani argued that since the alleged additional costs was to complete the balance 30% of the works either by Petronas or some third party, Petronas should be solely liable to pay for the sum and not, Ahmani.

[27] Further, subject to proof, Petronas may only be allowed to counterclaim for additional costs incurred to complete the works. That means the costs incurred beyond the RM260,470.20 which is the price of the balance 30% of the contract. Since the arbitral tribunal agreed with Ahmani that Petronas had failed to prove this additional costs, then the arbitral tribunal ought to have, 'at the most, awarded nominal damages'. This 30% balance of the contract price ought never to have been awarded as there was no claim for such amount. It is in this sense that learned counsel for Ahmani argued that the arbitral tribunal had decided on an issue which was not pleaded; and therefore went beyond the scope of submission to arbitration.

[28] On this matter of inflation, both counsel for the respective parties agreed that the parties were not asked to address on this matter, be it on its relevance or application, before the arbitral tribunal came to a decision on the counterclaim; that this was never submitted or raised by either of the parties. In fact, it was contended by Ahmani that the issue was never even pleaded or claimed, let alone presented or argued. By not inviting the parties to present or argue on the issue which formed the basis of its decision on the counterclaim, Ahmani contended that the arbitral tribunal had acted beyond its jurisdiction and breached rules of natural justice.

[29] Ahmani contended that the questions will substantially affect the outcome of Petronas' counterclaim for additional costs to complete the remaining works; thus affecting the rights of the parties — see paras 13 and 20 of affidavit filed in support (encl 2).

[30] Learned counsel for Petronas contended that the four questions of law posed need not be considered as the questions have not met the requirements of s 42. The questions are said to be not proper and valid questions of law.

[31] Learned counsel urged the court to dismiss the application in limine because the formulated questions of law are ambiguous and makes it difficult for them and also the court to 'figure out the issue that needs to be determined or the particular law or the applicable principle the plaintiff is challenging'. The relevant rules, case laws, legal principles and relevant facts have not been identified. Also, there is an element of inconsistency and confusion.

[32] Petronas argued that the questions are really questions of mixed fact and law and are in any case, not genuine and real. It was also contended that the

questions arose out of the proceedings and not the award in which case, s 42 does not operate. A restrictive approach is also advocated. Even if there is an error on the face of the award, that error must be one which renders the award manifestly unlawful and unconscionable.

[33] The award shows that the arbitral tribunal did not award Petronas the sum of RM260,470.20 as the additional costs; it was merely using the 30% balance of the remaining works as a basis to calculate the additional costs incurred by the defendant, in light of documentary evidence submitted by the defendant but 'in the absence of oral evidence to support the documentary evidence'.

FINDINGS AND DETERMINATION

[34] Having examined the award, these are the court's findings on the two challenges.

[35] First, the challenge under s 37; specifically sub-paras 37(1)(a)(iv) and (v); and (b)(ii); these are raised in 24C(ARB)-19–04 of 2015. the court observes that the cause papers have not properly intituled the relevant provisions of the Arbitration Act that are relied on by Ahmani. In view of the numerous grounds of complaint, this court takes the approach that there should be stricter detailed setting out of the particular grounds of challenge. This is not unlike the scenario one finds under s 218 of the Companies Act 1965 where a petition is made to wind up a company. The responding party must be made well aware of the relevant provisions of the law which are invoked. Petronas has not taken issue on this. Perhaps, it is because one can generally decipher the particular ground upon perusal and scrutiny of the body of the originating summons and the affidavit filed in support.

[36] I must say that sub-para 37(1)(a)(iv) is not properly invoked in the instant case as Ahmani is seeking to set aside only a part of the award (that which is in respect of the counterclaim); and not the whole award as there is that other part of the award which is in its favour. That being the case, only sub-para 37(1)(a)(v) can be relied on as read together with sub-s (3), it allows for those parts of the award which contain decisions on matters which had not been submitted to arbitration to be set aside.

[37] I must further say that sub-para 37(1)(b)(ii) cannot be invoked because again, this ground leads to the setting aside of the whole award and not just the part complained of. Ahmani cannot choose or cherry pick. Its challenge must also be seen against those parts which are not challenged or complained of. When that is done, it will be seen that it is only asking for certain parts of the

award to be set aside and not the whole award, which is what sub-para 37(1)(b)(ii) is about.

[38] I am fortified in this regard from a reading of sub-s 37(2). This sub-provision indicates that the complaint of conflict of public policy is in relation to the award or that the award contains decisions or decisions on matters which conflict with the public policy of Malaysia; and not just certain parts of the decision.

[39] In this case, the complaint is that there was a breach of natural justice during the arbitral proceedings or in connection with the making of the award when the arbitral tribunal dealt with the factor of inflation without first inviting the parties to submit or address on the factor. If indeed such an allegation is true, then it would be the whole award which will be tainted and not just that part identified by the complainant. The provisions of s 37 do not appear to allow the court to sever as it may in cases of allegations of violations of sub-para 37(1)(a)(iv). Mindful of the limited powers of intervention of the court, a restrictive approach is hereby adopted and applied.

[40] That leaves then a challenge under sub-para 37(1)(a)(v). Here, proof must be offered to show that the award contains decisions on matters beyond the scope of the submission to arbitration. While the matter of the counterclaim was what was submitted to arbitration, undoubtedly, the award contains a decision on the factor of inflation and how it co-relates or affects, in any degree or respect with or in the matter of the counterclaim for additional costs. Whether the factor of inflation amounts to a matter within the meaning or intent of sub-para 37(1)(a)(v) is one which this court must now determine.

[41] At the material time, the arbitral tribunal had found that there was no evidence on the costs of engaging third party because the maker of the documents relied on by Petronas were not called by Petronas. To this, the arbitral tribunal agreed with Ahmani that such person(s) '*should be called by the respondent in support thereof. Then the claimant can then question the witnesses as to the work carried out including the pricing of the materials etc. used on the remaining 30% of the project. The only exception perhaps is where the contents of the documents are agreed by the parties which is not the case here*'. The arbitral tribunal then went on to say that '*In the absence of evidence from the third party contractors to support their documents ...*' they had '*to consider what is a fair amount incurred by the respondent to support its counterclaim*'. Looking further along in the award, it can be seen that the arbitral tribunal decided that it '*would use the factor of 'inflation' in this case in the absence of oral evidence to support the documents for the benefit of the claimant as obviously it had to foot the costs*'. The arbitral tribunal decided to do so even though Petronas was not able

to prove its loss or counterclaim because Ahmani obviously had to '*foot the costs*'.

[42] Here, there are three points that must be made.

[43] In general, the parties have a right to be heard effectively on every issue that may be relevant to the resolution of the dispute. The overriding concern is fairness and the opportunity to be heard before the pronouncement or decision is made. Therefore, in keeping with that rule, the arbitral tribunal should not base its decision on matters that the parties have not submitted on. Although the arbitral tribunal is not required to select any one of the arguments or approaches articulated by the parties, it is perfectly entitled to steer a middle course through all the arguments made in order to reach its own conclusions or findings; any conclusion or finding reached nevertheless must be based on evidence placed before the arbitral tribunal. While the arbitral tribunal does not have to consult the parties on its thinking process before finalising its award, it must consult the parties where the argument by which it reaches its decision is one which does not reasonably flow from any of the already argued or submitted premises — see *Soh Beng Tee & Co Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28; [2007] 3 SLR (R) 86, discussed in *The Government of India v Cairns Energy & Anor* [2014] 9 MLJ 149. Where the arbitral tribunal has done so, as is alleged here, then a case of a breach of natural justice is made out.

[44] Next, it is significant to note that the arbitral tribunal had already agreed with Ahmani on the lack of evidence or proof of Petronas' counterclaim for additional costs incurred to complete the contract. The arbitral tribunal had in fact given similar reasons when rejecting Ahmani's claim for reimbursement of unpaid preliminaries.

[45] Thirdly, and this is most important, both parties before the court today have agreed that the fact and factor of inflation was never addressed by the parties nor were the parties invited to do so. In fact, the parties did not address the position of what happens if the evidence of Petronas' witnesses are disbelieved or the witnesses are not competent to testify on the documentary evidence before the arbitral tribunal given that they are not the makers of those documents. The parties did not address the arbitral tribunal on the factor of inflation and what would be a fair amount to 'support' Petronas' counterclaim. The parties only learnt about this matter for the first time from the award itself.

[46] Since the award has to be read in its entirety, and while claims and counterclaims may be separate and distinct claims, they frequently arise from the same facts or substantially the same facts; the whole reasoning of the arbitral tribunal must bear a measure of consistency. With a lack of proof, the arbitral

tribunal ought to have dismissed Petronas' counterclaim since the whole object of Petronas' counterclaim was a recovery or reimbursement of additional costs that it had to incur or had incurred by reason of Ahmani's non-completion of the contract. Petronas had to get a third party to complete Ahmani's work. As the counterclaim is essentially a loss and expense claim, there must at the very least some evidence before the arbitral tribunal could come to the decision on the counterclaim.

[47] The court is in agreement that where there is absent evidence to prove a claim, the claim or counterclaim ought to have been dismissed. This is especially so in the matter of special damages and where the responding party, Ahmani had denied the contents of those claims and had put Petronas to strict proof — see para 30 of Ahmani's reply to statement of reply and defence to counterclaim. When the arbitral tribunal had clearly found there was none, and it said so repeatedly, it was obliged to dismiss the counterclaim especially where it had already recognised that the burden was on Petronas to prove its counterclaim. Where the arbitral tribunal wants nevertheless to make some award, I believe, at best, it can only award nominal damages.

[48] Instead, the arbitral tribunal proceeded to assess a 'fair amount incurred by the respondent'. It did this by computing and thereby indirectly proving Petronas' counterclaim for Petronas. It did so in the manner that was pointed out; that is, by using the balance of the contract value as the base figure and adding 20% on top of that value to represent the unfinished job which now 'cost more to be completed by another contractor'. It is actually unclear what was the arbitral tribunal's basis or reason for putting a 20% value to the factor of inflation, even if for one moment, inflation was a relevant and valid consideration in the circumstances.

[49] With respect, this is where the arbitral tribunal has exceeded its jurisdiction. Where the arbitral tribunal wants to do more, which it obviously wanted in this case, including introducing the matter or element of inflation, as well as offer its views as to the value of that factor of inflation; the arbitral tribunal was obliged to go back to the parties. There, it may sound out its concerns, bring up this matter of inflation and even offer its view as to the value of the inflation as well as the source or evidence of that value and then, invite views or submissions of the parties on the matter. The arbitral tribunal is obliged to do so because it takes its jurisdiction from the submission of the parties. Although the parties may have submitted the matter of the counterclaim for the arbitral tribunal's determination, it was only within the terms as found in the points of claim, defence etc. The evidence was entirely of the parties' making and responsibility; not the arbitral tribunal's. The arbitral tribunal does not have inherent or residual powers or jurisdiction in these matters which are almost entirely dictated by the parties.

[50] Hence, the arbitral tribunal ought to have invited the parties to address or make further submissions first before it proceeded to consider and to make this particular item of award. It is this failure that gives merit to Ahmani's complaint that the award contains a decision on a matter beyond the scope of the submission to arbitration under sub-para 37(1)(a)(v).

[51] In the circumstances, the court is satisfied that Ahmani has established more than sufficient proof on a balance of probabilities of the existence of such decision within the meaning and operation of sub-para 37(1)(a)(v) warrants the setting aside of that part of the award. In fact, it may even be said to render the award manifestly unlawful and unconscionable in the terms of *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791.

[52] Since the award contains a decision on the matter of the inflation or even a decision on the matter of an assessment of a fair amount incurred by the respondent when there is a failure to prove the amount incurred in the first place, this decision is certainly beyond the scope of submission to arbitration by the parties. In such circumstances, the application comes within sub-para 37(1)(a)(v). Accordingly, that part of the award must be set aside.

[53] With that determination, there is in fact no necessity for the court to address the application under s 42.

[54] Be that as it may, on the challenge under s 42 (24C(ARB)-11–03 of 2015), the court agrees with Petronas that questions a and b do not come within the test of being real, proper and valid questions of law. The matter of the counterclaim was pleaded and that was what the arbitral tribunal was addressing in the material paragraphs complained of. However, in relation to the third and fourth questions, these are real and not dressed up questions relating to an appeal against the arbitral tribunal's findings.

[55] In the last year or so, there has been a flurry of decisions from the Court of Appeal, all giving guidelines on how to handle s 42 applications. Unfortunately, none of these cases referred to each other; and it is not immediately clear the reasons. It may perhaps be just a simple case of the different panels (though there were common members in some of these decisions) not being advised by the respective counsel. In civil litigation, until and unless a written judgment is made available, or unless the same counsel is involved, one is generally unaware or not appraised on the latest developments.

[56] In *SDA Architects (sued as a firm) v Metro Millenium Sdn Bhd* [2014] 2 MLJ 627, the Court of Appeal had advised that a proper and valid question of law is determined by '*considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt*

with by the arbitrator'. Hamid Sultan Abu Backer JCA added that '*... the final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside. (See Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791)'. Petronas has argued that Ahmani has failed to explain in what manner the award affects its rights and how it has affected those rights substantially. All that Ahmani has done is to make a general statement at para 20 of its supporting affidavit; and that is said to be insufficient.

[57] Then, there is *Awangku Dewa bin Pgn Momin & Ors v Superintendent of Lands & Surveys, Limbang Division* [2015] 3 MLJ 161, where the Court of Appeal also provided some guidelines when dealing with s 42 applications in the following terms:

> ... in considering a s 42 reference must not take lightly the duty to critically examine the questions posed by the applicant and to ensure that the question referred to the court is purely a question of law and not a question of mixed law and fact, and is clearly and concisely framed, before embarking to entertain the application and to answer the question posed. There should be no complication, confusion or duplicity in framing the questions. Instead, there should be simplicity and clarity. The legal burden is on the applicant to ensure that these requirements are strictly complied with.
>
> [28] A High Court in dealing with a s 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal. In other words, a court of law must always be vigilant against any attempt by a party to abuse the s 42 procedure as provided for by the Act and to utilise the provision as a backdoor avenue for appealing against the decision of an arbitral tribunal.
>
> [29] Perhaps, to put what we have just said in another way, the High Court must ensure that the question posed by the applicant to court is a proper and valid question ...

[58] The Court of Appeal cited the same guidelines mentioned above from the decision in *SDA Architects (sued as a firm) v Metro Millenium Sdn Bhd* [2014] 2 MLJ 627.

[59] Not to be forgotten is the Court of Appeal's decision in *Government of Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617. Again, the Court of Appeal felt compelled to set out some 'governing principles under s 42' which can be found at para 57 and which are not intended to be 'exhaustive':

(a) the question of law must be identified with sufficient precision

A (b) the grounds in support must also be stated on the same basis

(c) the question of law must arise from the award, not the arbitration proceeding generally ...

B (d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights

(e) the question of law must be a legitimate question of law; and not a question of fact 'dressed up' as a question of law ...

C (f) the court must dismiss the reference if a determination of the question of law will not have a substantive effect on the rights of the parties ...

(g) this jurisdiction under s 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases ...

D (h) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence ...

E (j) while the findings of fact and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[60] Despite stating these extensive guidelines, the Court of Appeal F acknowledged at para 58 of its judgment that '... the issue of what constitutes 'a question of law' is a difficult one'.

[61] Hence, the general principle that one can take away from these decisions is that the intervention should only be exercised in clear and G exceptional circumstances. The questions of law must only be questions of law and not questions of fact or even questions of mixed fact and law. These questions of law must be identified with sufficient precision or is intelligibly framed citing the grounds or basis relied on. The identified questions of law must also be legitimate, real, proper and valid; and they must arise out of the H award and not from or during the proceedings. It must be remembered that the arbitral tribunal remains the sole determinant of the facts and the evidence. the court however, must intervene where the award is manifestly unlawful and unconscionable.

I **[62]** At the risk of repeating what the court has already found satisfactorily proved, that the parties were not invited nor had they addressed the matter of inflation and its impact, application or relevance in computing Petronas' counterclaim for additional costs; and given that at that point of its award, the arbitral tribunal had already found that there was no evidence of the third

party's costs which is the root of Petronas' counterclaim; that there was in fact no evidence upon which the arbitral tribunal could proffer its findings and decision; that the arbitral tribunal did not explain where it sourced the factor of inflation; or the value of that factor of inflation in the matter of the computation of additional costs of completing the remaining works; the arbitral tribunal's decision on this matter was certainly and clearly one that it could not and should not have embarked on without first hearing out the parties. Doing so not only exceeded the limits of the dispute that was submitted to the arbitral tribunal for decision, it also breached the rules of fair play and natural justice. The decision of the arbitral tribunal on this matter is within what has been described in *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791 as a decision that requires intervention of the court as it 'is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside'; as recognised by all the decisions of the Court of Appeal.

[63] I am further satisfied that para 20 of the affidavit filed in support in the facts of this case adequately explains how Ahmani's rights have been affected substantially. Given all these consideration questions 3 and 4 are indeed valid and proper questions of law which the court now answers in Ahmani's favour.

[64] Under such circumstances, the court is inclined to agree with Ahmani that the arbitral tribunal's decision on the counterclaim must be set aside. It is, however, not for this court to substitute its views to the extent of exercising discretion on the award of nominal damages. It is only appropriate and just that that part of the award be set aside.

CONCLUSION

[65] The net effect of the award is that the award is now varied in Items 3 and 4 as follows:

(3) the respondent's counterclaim is allowed in the sum of	nil
(4) the respondent is allowed to set off as follows:	
(a) additional costs incurred by the respondent to complete the remaining 30% of the works	nil
(b) LAD	RM86,823.40
LESS	
(c) performance bond cashed	RM86,823.40
(d) amount of the claimant's claim allowed	nil
Total Balance	RM260,019.92

[66] The total amount should therefore read RM260,019.92. Accordingly, the award as varied to RM260,019.92 be awarded to the claimant together with interest on that sum at the rate determined and the same order as to costs.

[67] Petronas does not take the position that the award as varied can be enforced through its application. Consequently, Petronas' application is dismissed.

[68] Finally, the court grants a single order of costs of RM30,000 to Ahmani in respect of all three applications.

Application allowed with costs.

Reported by Kanesh Sundrum